



**In the Matter of:**

**L-3 COMMUNICATIONS  
JOINT OPERATIONS GROUP**

**ARB CASE NO. 02-120**

**DATE: January 30, 2004**

**Request for reconsideration of Area  
Wage Determination 1994-2222  
(Rev. 20, now Rev. 21) as applicable to  
the Special Operations Forces Support  
Activity Contract USZA22-97-C-0013  
located in Lexington, Fayette County,  
Kentucky.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner L-3 Communications Joint Operations Group:  
Alvin R. Appling, Lexington, Kentucky*

*For Respondent Administrator, Wage and Hour Division:  
Ford F. Newman, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq., U.S.  
Department of Labor, Washington, D.C.*

**FINAL DECISION AND ORDER**

This case arises under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.S.C.A. §§ 351-358 (West 1994) and regulations at 29 C.F.R. Parts 4 and 8 (2003). L-3 Communications Joint Operations Group (L-3) petitions for review of a ruling by the Administrator, Employment Standards Administration, Wage and Hour Division, denying L-3's request for review and reconsideration of Area Wage Determination 1994-2222 (Rev. 20) applicable to Special Operations Forces Support Activity Contract USZA22-97-C-0013. After thorough consideration of the record and the parties' positions we conclude that we are precluded from reviewing the wage determination because L-3 has not raised any significant issue of general applicability as required under 29 C.F.R. § 8.6. We accordingly deny L-3's petition for review.

## **Jurisdiction and Standard of Review**

Our review of the Administrator's decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1. We generally assess the Administrator's decision on her review and reconsideration of a wage determination to determine whether it is consistent with the applicable statutes and regulations and is a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Service Contract Act. *Dep't of the Army*, ARB Nos. 98-120/121/122, slip op. at 16 (ARB Dec. 22, 1999), *citing ITT Fed. Services Corp. (II)*, ARB No. 95-042A (ARB Jul. 25, 1996), and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (BSCA Aug. 28, 1992).

## **Regulatory Framework**

The SCA requires the Secretary of Labor to determine minimum wage and fringe benefit rates for service employees employed on Federal service contracts. The Administrator is charged by regulation with the responsibility for implementation. 29 C.F.R. § 4.3(a). Wage determinations are incorporated into contract specifications for each Federal service contract. In the absence of a collective bargaining agreement covering such employees, the Administrator issues a wage determination that reflects wages and benefits prevailing for service employees "in the locality." 41 U.S.C.A. § 351(a)(1) and (2); 29 C.F.R. §§ 4.50, 4.54. The Administrator bases these wage determinations on wage data, including surveys compiled by the Department's Bureau of Labor Statistics (BLS). 29 C.F.R. § 4.51. Interested parties affected by wage determinations may request review and reconsideration by the Administrator. 29 C.F.R. § 4.56(a)(1) and (2). The Administrator's decisions are subject to review by this Board. 29 C.F.R. § 4.56(b); 29 C.F.R. Part 8. If a party files a petition for review of a wage determination, prior to contract award, exercise of option or extension, the Board may review the wage determination after the award, exercise of option or extension "if the issue is a significant issue of general applicability." 29 C.F.R. § 8.6(d). Retroactive modification affecting wage determination rates for contemporaneous contract periods is not available, however. *D.B. Clark III*, ARB No. 98-106, slip op. at 9-10 (ARB Sept. 8, 1998).

## **Issues**

1. Is L-3 entitled to review of issues arising under Area Wage Determination 1994-2222 (Rev. 20) or to its retroactive modification?
2. Did the Administrator abuse her discretion by relying exclusively on a single occupational employment statistics survey in denying wage rate increases to classifications employed under Special Operations Forces Support Activity Contract USZA22-97-C-0013?

## Background

L-3 provides services to the Special Operations Forces in Lexington, Fayette County, Kentucky. On October 1, 2002, it commenced its final option year of multi-year Special Operations Forces Support Activity Contract No. USZA22-97-C-0013. Previously, on June 10, 2002, L-3 requested that the Administrator review and reconsider Area Wage Determination No. 1994-2222, the wage determination applicable to the contract. *See* Administrative Record (AR) Tabs E (Wage Determination) and H (L-3 request). L-3 requested that the Administrator consider data other than the 2000 Occupational Employment Statistics (OES) survey BLS conducted for the Lexington, Kentucky MSA (AR Tab F). In particular, L-3 requested consideration of Federal Wage Board data, BLS surveys for the Louisville and Covington, Kentucky MSAs, and a BLS OES survey for the State of Kentucky. AR Tab H, Attachments B-D. L-3 argued that use of these data sources was contemplated under 29 C.F.R. §§ 4.51 and 4.54. Based on the proffered data, L-3 recommended wage increases of three and four percent for 21 occupational classifications. AR Tab H, Attachment E.

On August 3, 2002, the Administrator denied L-3's request to increase the wage rates. She explained that OMB defined MSAs, that BLS conducted surveys based on MSA designations, and that the prevailing rates within a given locality assumed "consideration of existing wage structures . . . pertinent to the employment of particular classes of service employees on the varied kinds of contracts." AR Tab A. She also explained that since Lexington, Kentucky was a designated MSA, use of the applicable OES survey had been appropriate to update Wage Determination 1994-2222 previously, resulting in a 3.7 percent wage increase. The Administrator concluded:

Pursuant to your request, we reviewed the BLS OES survey data again. Based on our review of the 2000 BLS survey data for the Lexington, Kentucky MSA, the current wage rates in WD 94-2222 (Rev. 20) exceed the BLS OES survey data. Unless you have other data for Lexington, Kentucky to support your request, we are unable to increase the wage rates for the occupational classes based on the current data.

*Id.* L-3 timely petitioned this Board for review of the Administrator's decision. 29 C.F.R. § 4.56(b). On appeal, L-3 argues that the OMB process for establishing MSAs is flawed, that the 2000 BLS OES survey is flawed, that the data underlying the survey are outdated, and that use of Federal Wage Board rates is appropriate. L-3 requests current increase of the Area Wage Determination 1994-2222 aviation skills wage rates as recommended previously (AR Tab H, Attachment E) and prospective increase of those rates to become competitive with comparable rates issued for Louisville and Covington, Kentucky.

## Discussion

In her statement before us, the Administrator raises the issue whether our regulations preclude review or modification of Area Wage Determination 1994-2222. Statement of the Administrator in Opposition to Petition for Review at 3-5. The regulation addressing modification clearly precludes retroactive relief, providing that the Board's decision on review of a wage determination "shall not affect the contract" after award, exercise of option, or extension of the contract. 29 C.F.R. § 8.6(d); *D.B. Clark III*, ARB No. 98-106, slip op. at 9-10 (citing cases). In responding to the Administrator's statement L-3 concedes as much. It states that retroactive relief "is not an issue with L-3; we recognize the difficulty of retroactive increases in wages and only ask that this matter be resolved in an expedient manner." Petitioner's Response to Administrator's Statement of Opposition at 2. L-3 also states that any change resulting from this appeal "can be made effective the date of the new revision." *Id.* at 3.

The Administrator's threshold query about our authority to review the wage determination in the first instance is more problematic. The regulations provide generally that we may decline review if it "would be inappropriate because of lack of timeliness, the nature of the relief sought, the case involves only settled issues of law, the appeal is frivolous on its face, or other reasons." 29 C.F.R. § 8.6(a). With regard to the circumstances extant in this case where L-3 filed its petition for review of the wage determination prior to the exercise of the option, we may review the wage determination after exercise of the option "if the issue is a significant issue of general applicability." 29 C.F.R. § 8.6(d). The Administrator construes this language to dictate that "the Board may review the wage determination only for 'significant issue[s] of general applicability.'" Statement in Opposition to Petition for Review at 5.

Although it failed to address this aspect of the Administrator's query expressly (*see* Petitioner's Response at 2-3), L-3 raised issues in both its petition for review of the Administrator's denial and in response to the Administrator's filing before us. We accordingly will examine these issues to determine whether any of them qualify for review. Under the regulatory standard any such issue must be significant and apply generally.

L-3's primary issue is whether the Administrator abused her discretion by relying on the BLS OES survey for the Lexington, Kentucky MSA to the exclusion of other data. The Administrator routinely employs area surveys conducted by BLS in determining wage rates for service contracts within a given locality, however. This practice is hardly unusual. Indeed, it is a standard means of determining rates under the regulations. *E.g.*, 29 C.F.R. § 4.51(a) (pertinent information as to wage rates and fringe benefits "is most frequently derived from area surveys made by [BLS]"); 29 C.F.R. § 4.54 ("[l]ocality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area"). Any issue presenting a challenge to this methodology simply is not significant.

In response to the Administrator's statement in opposition to the petition for review, L-3 points to additional issues, namely its "unique" employment situation, "issues with [the] MSA," and "shortfall" of the OES survey. L-3 also reasserts its case for using data other than the BLS OES survey. Petitioner's Response at 3-12.

These additional issues are not persuasive. Any issues arising from L-3's "unique" employment situation by definition would preclude a finding of general applicability. As for the argument that the survey data are flawed because BLS did not include L-3 in its survey, L-3 has made no showing of the extent of disparate rates paid to its employees. Absent a comprehensive comparison we lack a basis for finding the issue significant.

L-3 questions the derivation of the \$16.44 2000 OES survey rate for aircraft mechanics, arguing that the elevated minimum area wage determination rate of \$17.29 "is testament that the OES survey is wrong." Response at 7. This single disparity would not appear to raise a significant issue of general applicability.

Finally, L-3 raises the issue of "old data," namely that the 2000 OES survey is outdated. Response at 9. However, as explained by the Administrator (Statement in Opposition to Petition at 8), BLS collects data continuously and less recent data are subject to adjustment. As it becomes available, more recent data may support changes in wage determinations. Absent a showing of extensive deviation from standard methodology, this issue is not substantial.

### **Conclusion**

L-3 has failed to show that any of the issues raised in its petition for review of the Administrator's decision are significant issues of general applicability. Because L-3 has not made this threshold showing, we may not review the wage determination, and we do not reach the issue of whether the Administrator abused her discretion. Accordingly, the petition is **DENIED**.

**SO ORDERED.**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**